

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EZRA PENDLETON,	§
	§ No. 487, 2011
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr. ID No. 0810005749
	§
Plaintiff Below-	§
Appellee.	§

Submitted: December 9, 2011

Decided: January 19, 2012

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

ORDER

This 19th day of January 2012, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Ezra Pendleton, filed an appeal from the Superior Court's August 8, 2011 order denying his first motion for postconviction relief pursuant to Superior Court Criminal Rule 61.¹ The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior

¹ Because this was Pendleton's first motion for postconviction relief, the Superior Court requested Pendleton's attorneys to submit affidavits in response to his claims of ineffective assistance of counsel. Super. Ct. Crim. R. 61(g) (2); *Horne v. State*, 887 A.2d 973, 975 (Del. 2005).

Court's judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.² We agree and affirm.

(2) The record before us reflects that, in April 2009, after a stipulated trial, Pendleton was found guilty of Possession With Intent to Deliver Cocaine and Maintaining a Vehicle for Keeping Controlled Substances.³ Pendleton's convictions stemmed from an administrative search of his residence by members of the Governor's Task Force, which yielded 3.05 grams of cocaine. Pendleton was sentenced as a habitual offender to a total of 15 years of Level V incarceration, to be followed by decreasing levels of supervision. Pendleton's convictions were affirmed on direct appeal.⁴

(3) In this appeal from the Superior Court's denial of his first postconviction motion, Pendleton asserts a number of claims that may fairly be summarized as follows: a) the drugs were seized in an illegal administrative search; b) he did not voluntarily waive his right to testify at trial; and c) his suppression hearing counsel and his trial counsel provided ineffective assistance by failing to properly investigate his case and subpoena certain witnesses and records for trial.

² Supr. Ct. R. 25(a).

³ Pendleton was found not guilty of Tampering With Evidence and the State dismissed several additional charges.

⁴ *Pendleton v. State*, 990 A.2d 417, 419 (Del. 2010).

(4) The Superior Court is required to apply the procedural requirements of Rule 61 before reaching the merits of the claims made in a motion for postconviction relief.⁵ In this case, Pendleton's claim that the administrative search was illegal was raised and decided against him in his direct appeal. As such, the claim is procedurally barred in this proceeding under Rule 61(i) (4) unless Pendleton can demonstrate that reconsideration of the claim is warranted in the interest of justice. In the absence of any evidence that would warrant reconsideration by this Court of its decision in Pendleton's direct appeal, we conclude that the Superior Court correctly denied Pendleton's first claim as procedurally barred.

(5) Pendleton's second claim is that he did not voluntarily waive his right to testify at trial. The record reflects that Pendleton and his attorney agreed with the State to conduct a stipulated trial. On April 28, 2009, the stipulation of facts was signed by the State, Pendleton's attorney and Pendleton himself, and thereafter filed in the Superior Court. The stipulation, consisting of nine separate paragraphs, recites all the evidence to be presented to the Superior Court judge at the trial, including the DVD copy of the statement Pendleton gave to police admitting to the crime. The

⁵ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

stipulation also contains Pendleton's admission that the evidence is sufficient for a jury to find him guilty beyond a reasonable doubt.

(6) While Pendleton claims that he was deprived of the opportunity to testify at his trial, the very purpose of the stipulation he signed was to obviate the need for live testimony. The stipulation automatically put his case in a posture for appeal to this Court on the only viable issue he had---the Superior Court's partial denial of his motion to suppress the drug evidence seized during the administrative search of his dwelling. Moreover, Pendleton admits that he voluntarily signed the stipulation. It defies reason to believe under these circumstances that Pendleton believed he would be offering live testimony at the trial. In light of all of the above, we conclude that the Superior Court properly found Pendleton's second claim to be meritless.

(7) Pendleton's third claim is that his suppression hearing counsel and his trial counsel provided ineffective assistance by failing to properly investigate his case and subpoena certain records and witnesses for trial. In order to prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings

would have been different.⁶ Although not insurmountable, the Strickland standard is highly demanding and leads to a strong presumption that the representation was professionally reasonable.⁷ The defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.⁸

(8) The record reflects that, at the suppression hearing, Pendleton's counsel raised the issue of the police improperly participating in the search and that the State conceded the argument in part. As a result, the Superior Court suppressed a portion of the drug evidence. Pendleton thereafter participated in a stipulated trial, conceding that the State had sufficient evidence to convict him beyond a reasonable doubt, evidence that included his own admission of guilt to the police. Pendleton has not demonstrated how any alleged failure on the part of his counsel to investigate the facts of his case resulted in prejudice to him under these circumstances. We, therefore, conclude that Pendleton has failed to sustain his burden under Strickland and that the Superior Court properly found that his claims of ineffective assistance were without merit.

⁶ *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

⁷ *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

⁸ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

(9) It is manifest on the face of the opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice